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COMPTROLLER GENERAL OF THE UNITED STATES  
WASHINGTON, D.C. 20548

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The Honorable John Melcher  
United States Senate

Dear Senator Melcher:

You have asked for our opinion on whether the Office of Rail Public Counsel (ORPC) has statutory authority to expend appropriated funds to intervene in railroad civil bankruptcy cases. You state that the ORPC has previously filed an intervenor brief in National Railroad Passenger Corporation v. United States, Civil Action No. 77-1596, currently pending before the Court of Appeals for the District of Columbia. It is presently considering intervening in a Milwaukee bankruptcy case now before a district court in the Seventh Circuit.

The Office of Rail Public Counsel was established by the Railroad Revitalization and Regulatory Reform Act of 1976 (4R Act), Pub. L. No. 94-210, (February 5, 1976), § 304(a), 90 Stat. 31, 51, which added a new section 27 to part I of the Interstate Commerce Act. Section 27(1) designated the ORPC as an "independent office affiliated with" the Interstate Commerce Commission (ICC). Section 27(4) prescribed the duties of the ORPC as follows:

"In addition to any other duties and responsibilities prescribed by law, the Office of Rail Public Counsel--

"(a) shall have standing to become a party to any proceeding, formal or informal, which is pending or initiated before the Commission and which involves a common carrier by railroad subject to this part;

"(b) may petition the Commission for the initiation of proceedings on any matter within the jurisdiction of the Commission which involves a common carrier by railroad subject to this part;

"(c) may seek judicial review of any Commission action on any matter involving a common carrier by railroad subject to this part, to the extent such review is authorized by law for any person and on the same basis;

"(d) shall solicit, study, evaluate, and present before the Commission, in any proceeding, formal or

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informal, the views of those communities and users of rail service affected by proceedings initiated by or pending before the Commission, whenever the Director determines, for whatever reason (such as size or location), that such community or user of rail service might not otherwise be adequately represented before the Commission in the course of such proceedings; and

"(e) shall evaluate and represent, before the Commission and before other Federal agencies when their policies and activities significantly affect rail transportation matters subject to the jurisdiction of the Commission, and shall by other means assist the constructive representation of, the public interest in safe, efficient, reliable, and economical rail transportation services.

"In the performance of its duties under this paragraph, the Office of Rail Public Counsel shall assist the Commission in the development of a public interest record in proceedings before the Commission."

It is suggested that the last portion of subsection 27(4)(e) ("by other means assist \* \* \*") provides the authority to intervene in railroad bankruptcy cases. Based on our review of the relevant legislation and legislative history, it is our opinion that the ORPC has a limited authority to participate in bankruptcy proceedings. Apart from this limited authority, described below, we do not believe ORPC may use appropriated funds to intervene in bankruptcy proceedings unless the statute is amended to specifically authorize such an undertaking or unless funds are expressly appropriated therefor.

The concept of a separate, independent public counsel's office associated with the ICC was endorsed by a staff panel appointed by the Chairman of the Commission in January, 1975, and an Office of Public Counsel was established administratively by the ICC later that year. It was contemplated by the ICC that the Public Counsel would be permitted to participate in all Commission matters to develop a public interest record and that the Counsel would insure that persons without adequate resources to obtain professional help would be able to make their views known to the Commission. Robert J. Corber, Public Counsel at the Interstate Commerce Commission, Association of ICC Practitioners, Transportation Law Seminar, 1975, Papers and

Proceedings, pp. 149-151. When announcing the creation of the Public Counsel's Office, the Commission indicated its functions as follows:

"1. Counsel shall have discretion to participate as a party in proceedings, adjudicative or rulemaking, before the Commission in which he deems his participation may be of assistance to the Commission in determining the public interest, and the Commission, on its own initiative, may direct his participation as a party . . . He will, in any proceeding in which he participates be responsible for assisting in the development of the record in the Commission's effort to determine the public interest with regard to the Interstate Commerce Act and related statutes, recognizing that such legislation provides the frame of reference within which the Commission operates, and that the policies expressed therein must be the basic determinants of its action." Id. at 150.

Congress, in enacting section 304 of the 4R Act, gave a permanent statutory charter to the Office of Public Counsel already operating within the ICC, to the extent of rail matters. In addition, section 304 contained provisions to assure the independence of the ORPC Director and staff, and to authorize the ORPC to seek judicial review of ICC actions and to represent the public interest before other Federal agencies, functions the existing Office of Public Counsel could not have carried out. B-175155, March 23, 1977.

Both the Senate and the House versions of the bill which became the 4R Act contained provisions for an Office of Public Counsel. The conference version limited it to rail matters and redesignated it as the Office of Rail Public Counsel. The provision which became subsection (4)(e), supra, was contained in the Senate but not the House version. The report of the Senate Commerce Committee contains the following discussion:

"Another impediment to regulation in the public interest has been the limited opportunity for the development of a public interest record before the Commission. While the provisions of the Interstate Commerce Act require public notice of proposed actions, an opportunity for interested persons to submit their views, and public hearings in some cases, public participation and more importantly, the development of a public interest record, has been limited.

"Acknowledging this problem, the Regional Rail Reorganization Act of 1973 gave an even more explicit mandate to the Commission's

Rail Services Planning Office created by that Act, to assure that the views of the public were adequately represented in the hearings and evaluations conducted by the Office. Section 205(d)(2) of that Act directed the Office to employ the service of attorneys and other personnel to protect the interests of communities and users of rail service which, for whatever reason, such as their size or location, might not otherwise be adequately represented in the course of the hearings and evaluations conducted under the Act,

"In response to this Congressional mandate, the Director of the Rail Services Planning Office appointed a Public Counsel whose functions [are] to provide legal representation and assistance to the public throughout the restructuring process set in motion by the Act. The Office conducted hearings on the preliminary system proposed by the USRA and at each hearing location one or two attorneys from the Office of Public Counsel were assigned to assist the public. These attorneys [met] continuously and extensively with the public in the weeks prior to the hearings and during the hearings themselves. The Office of the Public Counsel was independent of the administrative control of the Director in developing for the record any information or view deemed pertinent.

"In its oversight of the Regional Rail Reorganization Act, this Committee found the workings of the Office of Public Counsel contributed greatly to the reorganization process by both keeping those who might be affected by the Act informed of the reorganization process and by representing them in the various proceedings called for under the Reorganization Act. This work both increased public confidence in the outcome of the reorganization process and increased the quality of that process by insuring that the voice of all concerned was heard by the planning officials.

"The success of this limited experiment has led the ICC and this [Committee] to conclude that the public would benefit by the creation of a permanent Office of Public Counsel affiliated with the Commission to help the Commission to develop the record on issues affecting the public interest. The Commission moved in October to create such an Office and this legislation would provide a legislative sanction for this action. \* \* \* S. Rep. No. 94-499, 94th Cong., 1st Sess. 15-16 (1975).

The sectional analysis in the Senate Report discussed the matter further:

"There is presently no statutory provision in the Interstate Commerce Act for a Public Counsel. The Regional Rail Reorganization Act of 1973 directed the Commission's Rail Service Planning Office to employ attorneys and other personnel to protect the interests of communities and users of rail service in the evaluation and planning process taking place under the Regional Rail Reorganization Act of 1973 and the Director of the Office appointed a Public Counsel to perform that function.

"This section gives statutory authorization to the creation of a permanent Office of Public Counsel to be affiliated with the Commission. The Director of the Office is to be appointed by the President upon recommendation of the Commission with the advice and consent of the Senate for a four-year term. The Public Counsel is authorized to participate in any Commission proceeding, may petition the Commission for initiation of any proceeding, and may seek judicial review of any Commission action to the same extent and under the same circumstances as any other person. Public Counsel is also authorized to appear and represent the public interest in proceedings before other federal agencies but only insofar as the [proceedings] directly affect transportation matters under the jurisdiction of the Interstate Commerce Commission.

"The primary duty of the Office of Public Counsel will be to assist the Commission in the development of a public interest record in proceedings before the Commission. \* \* \* It will be the duty of the Public Counsel to attempt to improve the quality of regulation by the Commission by developing arguments before the Commission which would not otherwise be presented by parties whose interests are represented in proceedings before the Commission.

"For example, the Commission is often only able to hear the views of proponents and opponents of proposed mergers being reviewed by the Commission. Cross-examination is often limited to the issues in which the parties directly concerned with the proceeding are interested. However, the standard for approving a merger is that it be in the public interest, and the public interest will often be in effects of a merger that may not concern the parties arguing the case before the Commission. It will be the duty of the Public

Counsel to introduce evidence as to the effect of proceedings before the Commission on the public interest and to cross-examine parties with regard to issues affecting the public interest.

"It will also be the duty of the Public Counsel to scrutinize the Commission's regulatory policies and to appear before the Commission to advocate such changes in those policies as he feels would enhance the quality of surface transportation regulation." Id., at 63-64.

The conference bill followed the Senate bill with certain exceptions. The functional limitation was described as follows:

"[T]he functions of the Office are limited to rail matters before the Commission and other Federal transportation agencies whose policies and activities significantly affect rail transportation matters subject to the jurisdiction of the Commission." H.R. Rep. No. 94-781, 94th Cong., 2d Sess. 164 (1976) (conference report).

The above excerpts from the legislative history illustrate the type of activities intended for the ORPC. In our view, they clearly indicate the context in which the "other means" language of subsection (4)(e) was enacted. The primary role of the ORPC is to represent the public interest before the ICC. It may also independently seek judicial review of ICC actions and may represent the public interest before other Federal transportation agencies in rail matters. By virtue of the last portion of subsection (4)(e), the ORPC has a certain range of discretion to assist the representation of the public interest "by other means," but we do not believe this was intended, nor may it properly be construed, as an open-ended authorization. Apart from the limited authority of subsection (4)(c) to seek judicial review of a Commission action, we have found no authority in statutory language and no reference in the legislative history to intervention in judicial bankruptcy proceedings as an approved activity for the ORPC. The ORPC's involvement in National Railroad Passenger Corporation v. United States, which you mention in your letter, concerned an appeal by the Corporation (Amtrak) from ICC orders determining rate subsidies. Although the ORPC did not independently seek judicial review of the orders but merely filed a brief as a component office of the ICC, its participation was clearly authorized by subsection

(4)(c), supra. The question is whether the ORPC can intervene in a railroad bankruptcy proceeding at the judicial level when the ICC has not yet participated in any way. The answer, under these circumstances, is no.

However, by virtue of ORPC's express authority to seek judicial review of ICC actions, a limited degree of ORPC participation may be permissible under the bankruptcy laws. Prior to the revision of the bankruptcy laws in the last Congress (Pub. L. No. 95-598, November 6, 1978), the ICC was integrally involved in railroad bankruptcy proceedings. This involvement was sharply curtailed, although not entirely eliminated, in the revision. Pursuant to section 402 of Pub. L. No. 95-598, the new law generally takes effect on October 1, 1979. Under section 403, a case commenced under the former law shall for the most part continue to be conducted in accordance with the former law.

Thus, for a case commenced under the present Chapter VIII of the Bankruptcy Act, unless the functions of the ICC have terminated pursuant to section 618(b) of the 4R Act, 45 U.S.C. § 791(b)(4), the provisions of 11 U.S.C. § 205 (1976) would still be relevant. Pursuant to 11 U.S.C. § 205(d), the ICC must hold hearings on a railroad reorganization plan, and must approve the plan and certify it to the court. Under 11 U.S.C. § 205(e), "parties in interest" may file objections to the plan with the court. The court must hear the objections before ruling on the plan. The court may then either approve the plan, dismiss the proceedings, or "in [the judge's] discretion and on motion of any party in interest refer the proceedings back to the Commission for further action."

The ORPC has standing to become a party to any proceeding before the ICC, and can independently petition the ICC to initiate proceedings within the ICC's jurisdiction. Thus, the ORPC is a statutory party in interest to any proceedings within the ICC's jurisdiction. As such, it is clear that the ORPC can participate in ICC hearings on a "Chapter VIII" reorganization plan. If the ICC should certify to the court a plan which ORPC believes does not adequately reflect the public interest, the ORPC may file objections with the court pursuant to 11 U.S.C. § 205(e). This would amount to seeking judicial review of a Commission action, the specific action being the approval of the plan, which as discussed earlier, the ORPC has specific authority under subsection (4)(c) to do. As noted above, this authority exists only to the extent that the ICC's functions have not terminated with respect to a particular case in accordance with 45 U.S.C. § 791(b)(4).



When the new bankruptcy law goes into effect, 11 U.S.C. § 205 will be repealed, and railroad reorganizations will be covered by subchapter IV of chapter 11. 11 U.S.C. §§ 1161 et seq. Under subchapter IV, ICC has a much more limited role. It will no longer approve the reorganization plan but rather this will be the responsibility of the court. Although ICC may appear and be heard on any issue, it may not appeal from any judgment or order (11 U.S.C. § 1164, 92 Stat. 2641). Under the new 11 U.S.C. § 1170 (92 Stat. 2643), the ICC will have a very limited function with respect to abandonment of a railroad line. If the proposed abandonment would otherwise require ICC approval, the trustee must file an application with the ICC. The ICC then reports on the application to the court, which may in turn issue an order authorizing the abandonment. While ORPC could participate in the ICC's consideration of the application, the ICC's report to the court is primarily advisory and would not, in our opinion, constitute "Commission action" subject to judicial review. The new 11 U.S.C. § 1166 (92 Stat. 2642) further limits ICC's potential involvement by providing that the trustee and debtor will not be subject to the Interstate Commerce Act with respect to abandonment, merger, modification of the debtor's financial structure, or issuance or sale of securities under a reorganization plan.

To the extent the ICC becomes involved in a railroad bankruptcy proceeding under the new law, the principles discussed above would seem to be still applicable; that is, the ORPC can become involved in any proceeding before the ICC and can seek judicial review of a Commission action "to the extent such review is authorized by law for any person and on the same basis." Under the new law, however, there would appear to be very few situations in which these principles would be applicable. See, e.g., 11 U.S.C. § 1172(b), 92 Stat. 2644.

Thus, in our opinion, the ORPC can participate in the ICC's functions under the bankruptcy laws, and can "intervene" in the court proceedings only to the extent that such intervention can be deemed seeking judicial review of Commission actions. Apart from this, we do not believe ORPC has the general authority to intervene in court proceedings. Should the broader authority be desired, specific legislative authority should be sought.

Sincerely yours,

(SIGNED) ELMER B. STAATS

Comptroller General  
of the United States